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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 174.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

MINNESOTA TEA COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 99-109) is reported in 28 B. T. A. 591. The opinion of the Circuit Court of Appeals is reported in 76 F. (2d) 797.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 25, 1935. The jurisdiction of this Court is

invoked by the petitioner under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

1. Whether a transfer by one corporation (the Minnesota Tea Company) of substantially all its properties to another corporation (the Grand Union Company) in exchange for 18,000 shares of the common stock of the latter (worth $540,000 (R. 113)), plus $426,842.52 in cash, followed by the distribution of the cash to the stockholders of the transferor corporation, the transferor corporation remaining in existence and holding as its assets the 18,000 shares of stock of the transferee, constitutes a "reorganization" within the meaning of Sec. 112(i)(1)(A) of the Revenue Act of 1928.

2. Although the petitioner states (p. 2 of the petition) that another question is presented, the respondent respectfully submits that, for the reasons hereinafter stated, any question other than the foregoing is not in issue in this case.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are set forth in the Appendix (pp. 13-16) to the Government's petition, and are not repeated here.

STATEMENT.

The facts, as stipulated before the Board of Tax Appeals, appear to have been correctly stated on pages 2-6 of the Government's petition. A statement of the following phases of the facts seems necessary, however, for a proper understanding of the decision of the court below.

First, in the letter of deficiency (R. 10), the Commissioner held that the transfer of assets to the Grand Union Company constituted a "reorganization" as defined in Sec. 112(i)(1)(A), Revenue Act of 1928, "in that it was the ac-

quisition by one corporation of all the properties of another corporation. Both the Minnesota Tea Company and the Grand Union Company were parties to the said reorganization. General Counsel's Memorandum 3827, Cumulative Bulletin, VII-2, page 114."

The case therefore went to the Board of Tax Appeals, not on any issue whether or not there was a reorganization, but on the sole issue whether the Tea Company, when it distributed the $426,842.52 of cash to its stockholders, in a transaction in which the stockholders agreed to pay certain liabilities of the Tea Company, had as a matter of law distributed pursuant to the plan of reorganization, all the cash or only the net difference between $426,842.52 and the liabilities assumed by the stockholders. The Commissioner took the position that to the extent that liabilities had been assumed by the stockholders, the cash had not been "distributed" within the meaning of Sec. 112(d)(2) of the Revenue Act of 1928, and that, accordingly, taxable gain was recognizable to the Tea Company to the extent of $106,471.73, with a resulting deficiency in income taxes of the Tea Company of $11,587.64 for the taxable year 1928 (R. 11, 15). The taxpayer took the position that all the cash had been "distributed" and that no deficiency was assessable. (R. 4.) Both parties originally briefed and argued the case solely on this issue. (R. 116.)

The Board of Tax Appeals (two members dissenting), in spite of the fact that no question of "reorganization" had been raised by the letter of deficiency, nor by the pleadings and arguments of the parties, and overthrowing the settled administrative practice of more than a decade, held there was no "reorganization," did not pass on the only question raised in the letter of deficiency, and subsequently over the objection of the taxpayer's counsel, entered judgment showing a deficiency of $72,686.90 (R. 114), instead of $11,587.64 as proposed by the Commissioner.

On appeal by the taxpayer to the Circuit Court of Ap-

peals for the Eighth Circuit, the Circuit Court in an able opinion by Judge Booth, rejected the contention of the Commissioner that no reorganization occurred, and held that there was a reorganization (1) within the wording of the statute, (2) under the administrative construction of long standing, and (3) within the intent and purpose of Congress.

Second, no question was ever raised by either party prior to the filing of the petition for certiorari here as to the effect of the organization of the Peterson Investment Company to which certain assets not essential to the business of the Tea Company were transferred prior to the transfer of assets to the Grand Union Company.

In the letter of deficiency (R. 9), the Commissioner held as follows:

> "With reference to the transfer of a portion of its assets to the Peterson Investment Company, since the Minnesota Tea Company or its stockholders, or both, were in complete control of the transferee immediately after the transfer, said transaction clearly constituted a reorganization under Section 112(i)(1)(B) of the Revenue Act of 1928, to which both of said corporations were parties. No taxable gain resulted to the Minnesota Tea Company from this transaction under Section 112(b)(4) of the Revenue Act of 1928."

The Board of Tax Appeals properly assumed that no issue regarding the organization of the Peterson Investment Company was involved. Likewise, in the submission of the case to the Circuit Court of Appeals, no such question as the Commissioner seeks to raise here, was even suggested. In fact, in his oral argument to the Circuit Court, counsel for the Commissioner argued that the transfer to the Peterson Investment Company constituted a "true" reorganization, because the Tea Company stockholders remained in "control," and that the transfer to the Grand Union Company was not a "true" reorganization because the Tea Company or its stockholders were not in "control"

of Grand Union. It was only natural and proper, therefore, that the court below should regard the organization of the Peterson Investment Company as "not of vital importance in the present controversy" (76 F. (2d) 798) and proceed to a decision of the only question before it, whether the transfer by the Tea Company of substantially all its properties to the Grand Union Company constituted a reorganization. Now, however, the Commissioner again shifting his position in the controversy seeks to raise for the first time a question regarding a transaction which in his letter of deficiency,—the only basis for the appeal to the Board of Tax Appeals and all proceedings thereafter,—he had held clearly constituted a reorganization.

SUMMARY OF ARGUMENT.

The transactions here constituted a reorganization within the express definition of reorganization contained in the Act, but they also come within the spirit of the Act as well.

In holding there was a reorganization, the court below merely followed the long-established administrative practice of the Bureau. This administrative practice, shown in the income tax regulations for more than a decade, was adopted by Congress as a part of the law when it reenacted the definition of reorganization, without change, in the Revenue Acts of 1924, 1926, 1928, and 1932.

The point as raised by the Board of Tax Appeals, that no reorganization occurred because the Tea Company was not "dissolved" is a point that had been considered many years previously by the Bureau of Internal Revenue, and held to be without merit. Furthermore, the Act itself shows that dissolution could not have been deemed essential by Congress.

The decision of the court below is not in conflict with the decisions cited by the petitioner. On the contrary, in *C. H. Mead Coal Co.* v. *Commissioner*, 72 F. (2d) 22 (C. C. A., 4th), cited by the petitioner as being in conflict, the court

expressly recognized factors which influenced the court in the decision here. The facts in *John A. Nelson Co.* v. *Commissioner*, 75 F. (2d) 696 (C. C. A., 7th), now pending before this Court on petition for certiorari, and in *G & K Manufacturing Co.* v. *Commissioner*, 76 F. (2d) 454 (C. C. A., 4th) were different from those here involved, where a consideration consisting largely of common stock of the transferee corporation was received in exchange for substantially all the properties of the transferor.

Nor is the decision of the court below in conflict with *Pinellas Ice & Cold Storage Co.* v. *Commissioner*, 287 U. S. 462, where only short-term purchase money notes were received.

This case is not at all like *Gregory* v. *Helvering*, 293 U. S. 465. There is no suggestion anywhere in the record that the transactions here were influenced by the desire to avoid tax. On the contrary, in the letter of deficiency (R. 9), the Commissioner held that the organization of the Peterson Investment Company was clearly a reorganization, and at no stage of the proceedings prior to the filing of the petition for certiorari here, has he taken any other position.

ARGUMENT.

The opinion of the court below is able and convincing and covers all the factors necessary to a correct decision of the case.

First, as is shown in that opinion, the transaction by which the Grand Union Company acquired substantially all the properties of the Tea Company, in return for common stock of the acquiring corporation and cash, is clearly within the wording of Sec. 112 (i)(1)(A) of the 1928 Act which provides that

> "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or sub-

stantially all the properties of another corporation) . . ."

As said by the court below, "The language is plain and unambiguous. The ascertainment of its meaning is simple."[1]

Second, in deciding there was a reorganization in this case, the court below merely gave effect to the long-established administrative practice of the Bureau of Internal Revenue.[2] The Commissioner followed the administrative practice when, in the letter of deficiency (R. 10), he held there was a reorganization.

The transaction is clearly a reorganization under the following regulations and rulings:

Art. 1574, Reg. 65 (1924 Act)
Art. 1574, Reg. 69 (1926 Act)
Art. 574, Reg. 74 (1928 Act)
Art. 574, Reg. 77 (1932 Act)
G. C. M. 1753, VI-1 C. B., p. 138
G. C. M. 3827, VII-2 C. B., p. 114.

The court below, in addition to citing the foregoing authorities, referred to *Tulsa Oxygen Co.*, 18 B. T. A. 1283, *National Pipe & Foundry Co.*, 19 B. T. A. 242, 250, *First National Bank of Champlain*, 21 B. T. A. 415, 422, and *Robert D. Green*, 24 B. T. A. 719, 725, and held that the long-continued administrative construction of the language of the definition and the repeated reenactments of it by Congress without change (in the Revenue Acts of 1924, 1926, 1928, and 1932) led to the application of a principle

[1] In *Adams Express Co.* v. *Kentucky*, 238 U. S. 190, 199, this Court said: "It is elementary that the first resort, with a view to ascertaining the meaning of a statute, is to the language used. If that is plain there is an end to construction, and the statute is to be taken to mean what it says."
The doctrine applies with especial force to tax statutes. *Crooks* v. *Harrelson*, 282 U. S. 55.

[2] On page 9 of his petition here, the Commissioner states: "It is true that the administrative officers have recognized a transaction such as is here involved as satisfying the statute," but fails to cite authorities. In his brief to the court below, the Commissioner made a similar statement and cited the applicable regulations.

well established by the decisions of this Court that such reenactment is an adoption by Congress of the administrative construction. See *Old Mission Portland Cement Co.* v. *Helvering*, 293 U. S. 289; *Helvering* v. *Bliss*, 293 U. S. 144; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, all decided at the term of Court just ended. In each of those cases, as in this one, the Bureau had by its regulations construed the statute, Congress had reenacted it, and then the Bureau sought to reverse its interpretation. In each of those cases, the attempt of the Bureau was unsuccessful.

Finally, the court below held that the intent and purpose of Congress, as shown in the Committee reports accompanying the various revenue acts, necessitated a holding of "reorganization" in this case, as did the spirit of the Act, and that such holding was in full accord with the decision of this Court in *Pinellas Ice & Cold Storage Co.* v. *Commissioner*, 287 U. S. 462.

The Board of Tax Appeals had held that as no "dissolution" of the Tea Company occurred, "control" of the Grand Union Company by the Tea Company or its stockholders was necessary, for the reason that part (A) of the definition[3] "may not be read so broadly in respect of the acquisition of property for stock as to stultify (B), dealing with the transfer of property for stock." (28 B. T. A. 594.)

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[3] The complete definition, in Sec. 112(i)(1), 1928 Act, reads as follows:

"(i) *Definition of reorganization.*—As used in this section and sections 113 and 115—

"(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected."

It will be noted that the definition is divided into four major parts, "(A)," "(B)," "(C)," and "(D)."

Dissolution of the transferor corporation has not been required by the administrative practice since 1922.[4]

In so holding, the Board failed to mention, and probably did not know about, certain items of legislative history considered by the court below and which seem to be decisive as to the intention of Congress.

Part (A) of the definition, which covers the transaction here, first appeared in the 1921 Act, Sec. 202(c); in that act there was no provision whatever in regard to reorganizations involving control by the transferor or its stockholders. Reorganizations of the latter type were included for the first time in the Revenue Act of 1924, Sec. 203(h)(1)(B), and the purpose of Congress in inserting the new provision in the definition was clearly stated at the time by the House Ways and Means Committee, which reported as follows:

> "Subdivision (h)(1) contains a definition of reorganization which corresponds to the definition in Section 202(c)(2) of the existing law. The *only change* in the definition is to *include* within its terms the case of a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders, or both, are in control of the corporation to which the assets are transferred. This is a common type of reorganization, and clearly should be *included* within the reorganization provisions of the statute."[5]

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[4] The 1918 law contained no definition of reorganization, and Art. 1567 of Reg. 45 thereunder had specifically required dissolution. The administrative authorities, when they came to draw the regulations under the 1921 Act, which contained a statutory definition of reorganization, concluded that dissolution could no longer be required in cases like the present one and struck that requirement out of the regulations. See Reg. 62, Art. 1566(b), approved Feb. 15, 1922. No change in the part of the definition here involved was made in the subsequent Acts of 1924, 1926, 1928, and 1932, and the regulations continued to omit the requirement of dissolution. See Art. 1574 of Reg. 65 (1924 Act) and Reg. 69 (1926 Act); Art. 574 of Reg. 74 (1928 Act) and Reg. 77 (1932 Act). Moreover, the Acts themselves show that dissolution could not have been deemed essential by Congress. See the opinion of the court below, at p. 802 of 76 F. (2d); and *Watts* v. *Commissioner*, 75 F. (2d) 981, 983 (C. C. A., 2nd).

[5] Rep. No. 179, 68th Cong., 1st Sess., p. 16; see also Senate Finance Committee, Rep. No. 398, 68th Cong., 1st Sess., p. 17; Magill, "Notes on the Revenue Act of 1924," 24 Col. L. Rev. 836, 845.

Obviously, as control was not required under the 1921 Act in cases where substantially all the properties were acquired by another corporation, and as the committee reports show that the "only" change in the definition was to "include" the case of a transfer by a corporation of all or a part of its assets, the matter of control is of no consequence whatever in determining the applicability of part (A) of the definition involved. As long ago as 1927, this fact was brought out by the General Counsel of the Bureau of Internal Revenue in G. C. M. 1753, VI-1 C. B., p. 138, which is cited and quoted in the opinion of the court below. See also *C. H. Mead Coal Co.* v. *Commissioner*, 72 F. (2d) 22, 27.

In its petition for certiorari, the Government asserts (pp. 7-8) that the decision below is in conflict with *C. H. Mead Coal Co.* v. *Commissioner*, 72 F. (2d) 22 (C. C. A., 4th); *John A. Nelson Co.* v. *Commissioner*, 75 F. (2d) 696 (C. C. A., 7th), now pending before this Court on petition for certiorari; and *G & K Manufacturing Co.* v. *Commissioner*, 76 F. (2d) 454 (C. C. A., 4th). It states that the court below in the present case gave no consideration to whether the transaction partook of the nature of a merger or consolidation, holding that the transaction satisfied the literal language of the statute, that the stock represented a continuity of interest, and that the statute required nothing more. From this, it argues, inferentially, that the decision below is inconsistent with *Pinellas Ice & Cold Storage Co.* v. *Commissioner*, 287 U. S. 462.

The respondent submits that, in view of the facts there involved, and reading the opinion of this Court as a whole, the narrow construction which the Government takes as to the Pinellas Case is not warranted;[6] but even assuming the

[6] It would appear that the pith of this Court's decision in the Pinellas Case is found in the following sentence from the opinion: "Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase money notes." (287 U. S., at p. 470.)

soundness of the Government's construction, it seems clear that the determination whether any given transaction "partakes of the nature of a merger or consolidation" is essentially a question of fact concerning which the decisions of the lower courts may properly be deemed as final.

In *C. H. Mead Coal Co.* v. *Commissioner, supra,* the Circuit Court of Appeals for the Fourth Circuit, sustaining the Commissioner, held, as did the court below in the instant case, that part (A) of the reorganization definition is not modified or restricted by part (B) of that definition; the court also held, as did the court below in the instant case, that the legislative history of the reorganization provisions clearly demonstrates that the terms "merger" and "consolidation" are to be given a liberal interpretation to effectuate the purposes with which they were enacted.

The facts in each of the other cases cited by the Government as being in conflict with the decision of the court below were different from those here involved.[7]

It clearly appears that the transactions here partook of the nature of a merger or consolidation. The Tea Company received $540,000 in value of the common stock of the Grand Union Company and there was every element present that would have been present in a strict merger, except technical dissolution of the Tea Company, and dissolution has not, since 1922, been deemed necessary by the administrative practice of the Bureau.[8]

As a further ground for granting the writ, the Government argues (p. 11) that the decision below is in conflict with the decision of this Court in *Gregory* v. *Helvering,* 293 U. S. 465. In neither the court below nor in the Board of Tax Appeals did the Government argue that the transaction

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[7] In *John A. Nelson Co.* v. *Commissioner,* 75 F. (2d) 696 (C. C. A., 7th), the taxpayer, as pointed out by the Government in its memorandum not opposing certiorari, now on file in this Court (No. 61, October Term, 1935), received only preferred stock, callable at the option of the transferee.

In *G & K Manufacturing Co.* v. *Commissioner,* 76 F. (2d) 454 (C. C. A., 4th), there appears to have been a question of fact as to whether "substantially all" the properties were transferred.

[8] See footnote 4, *supra.*

involving the Peterson Investment Company, nor any other transaction herein, was an "elaborate and devious form of conveyance masquerading as a corporate reorganization." On the contrary, as hereinbefore mentioned, the Commissioner ruled in the letter of deficiency (R. 9) that the transfer of assets to the Peterson Investment Company "clearly constituted a reorganization." As also pointed out hereinbefore, counsel for the Commissioner in his oral argument to the court below took the position that the said transaction was a "true" reorganization. There is no suggestion anywhere in the record that the transactions here were influenced by the desire to avoid tax. There was no such purely artificial procedure as formed the basis for the decision of this Court in the Gregory Case, where, as recently pointed out by the Circuit Court of Appeals for the Second Circuit in *Chisholm* v. *Commissioner*, decided July 8, 1935, the purpose of the incorporators was "merely to draught the papers" and not in fact to create real corporations.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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